



**Commissioner of Customs & Border Control v Welrods Limited (Customs Tax Appeal E037 of 2023) [2025] KEHC 12562 (KLR) (11 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12562 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CUSTOMS TAX APPEAL E037 OF 2023**

**FR OLEL, J  
SEPTEMBER 11, 2025**

**BETWEEN  
COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... APPELLANT  
AND  
WELRODS LIMITED ..... RESPONDENT**

**JUDGMENT**

**A. INTRODUCTION**

1. This appeal arises from the judgment/decree of the Tax Appeals Tribunal delivered in Tax Tribunal Appeal No E592 of 2022, dated 14<sup>th</sup> July 2023, where the said tribunal upheld the respondent's Appeal and set aside the Appellants' review decision dated 7<sup>th</sup> February 2022, where they had demanded additional tax amounting to Kshs1,155,914.00/= from the respondent on account of incorrect tariff classification of imported steel coils.

**B. Background & Pleadings**

2. The respondent company ordinarily engages in the business of making welding electrodes and had imported hot steel wire rods quality sae 1006 in coils size diameter 5.5mm under import entry no 20191CD129757, which upon inspection was classified under 2017 EAC/CET Code 7213.91.90 (Bars and rods, hot -rolled, in irregularly wound coils of iron or non-alloy steel-other which attracted 0% duty). The Appellant, pursuant to the provisions of Sections 235 and 236 of the East Africa Customs Community Act (EACCMA) 2004, conducted a post-clearance laboratory analysis and reclassified the respondents imported product under HS code 7227.90.00 (Bars and rods, hot-rolled, in regularly wounded coils of other alloy steel-other chargeable at duty of 25% or \$200/MT, whichever is higher).As a result of this reclassification, the Appellant issued a demand notification through its letter dated 11<sup>th</sup> January, 2022, demanding that the respondent pay additional tax of Kshs 1,124,544.00/=, including interest and penalties. The additional taxes comprised customs duties and Value Added Tax



(VAT). The appellant disputed the tariff ruling and applied for its review through their letter dated 19<sup>th</sup> January, 2022, attaching the Mill test certificates received from their manufacturer in a bid to convince the appellant that its imported products fell under HS Code 7213.91.90, but vide their response dated 7<sup>th</sup> February 2022 the Appellant upheld its tariff ruling dated 16<sup>th</sup> November 2021.

3. Being dissatisfied with the Appellants review decision the respondent filed its notice of appeal on 30<sup>th</sup> May 2022, raising several grounds of appeal together with the witness statement of one Mr Sirju Patel dated 29<sup>th</sup> September, 2022, where he averred that they had imported wire rods in coils under import entry no 20191CD129757 and in addition to ensure that classification of their goods was properly done, attached the commercial invoice, IDF, customs entry, mill test certificates and a letter from the supplier confirming that the consignment was within the declared classification, ( HS Code 7213.91.90).
4. The respondent witness further clarified that the imported raw material were used to manufacture welding electrodes, which did not require boron, and thus it was not a basic element of its final product. This too, had been confirmed by their Mill Test Certificate, which indicated that the imported goods do not contain boron element above the threshold of 0.0008%. As such given that its imports were categorized as non-alloy steel, they were properly classified under tariff 7213.91.90, “Bars and rods hot rolled, in irregularly wound coils of iron or non-alloy steel-other” attracting 0% import duty and 16% VAT,” therefore no additional duty was payable by them.
5. The faulted the post clearance audit/laboratory tests carried out by the appellants’ officers and wondered why products samples collected in August 2019 were kept under the custody and only analysed on 31<sup>st</sup> January, 2022. It could not be ruled out that the appellants officer may have wrongly mixed its samples with those of other importers intentionally, with the sole aim of enhancing its tax collection targets.
6. They further posited that the wire coils they imported from Turkey (SAE 1006) was confirmed by its supplier, steel force Europe, as non-alloyed steel grade under HS Code 7213.91.90, by mill test certificate provided by Kroman CeliSanyaii A.S and their supplier both of whom were categorical that the wire rods supplied out of Turkey were authentic and also did not contain any alloy element over the limited indicated in chapter 72 of the EAC-CET.
7. The final issues raised by the respondent was that the appellant had alleged that their Mill certificates were not authentic, but did not provide evidence to prove the same. Secondly, they had also failed to avail their laboratory sampling forms to validate that it was signed by the sample collector, a witness and their agent/employee as procedurally required. Therefore, the authenticity laboratory analysis results dated 31<sup>st</sup> January, 2022 was wanting and could not be relied upon.
8. The respondent also urged the tribunal to note that since there were two distinct analysis results of the same product, the tribunal should exercise their discretion to order sample of the product to be sent to a neutral body (World Customs Organization) for independent analysis, to ensure that proper and/or relevant information/evidence is placed before the court for determination.
9. The respondent therefore urged the tribunal to set aside and strike out the respondent’s review decision issued vide their letter dated 3<sup>rd</sup> March 2022, classification undertaken vide the letter dated 16<sup>th</sup> November, 2021, demand letter dated 11<sup>th</sup> January, 2022 and 17<sup>th</sup> January, 2022 demanding for Kshs 1,124,544.00/=, the Appeal decision dated 7<sup>th</sup> February, 2022 and further demand letter of 4<sup>th</sup> May, 2022 demanding a sum of Kshs 936,658.00/= . They also requested for a permanent injunction to bar the appellant and its agents from continuing to demand this sum and finally also prayed to be awarded the costs of the Appeal.



10. The Appellant herein, who were the respondents before the tribunal opposed the appeal before the tax tribunal through their statement of facts dated 6<sup>th</sup> July, 2022 and statement of facts, sworn by one Moses Agufana dated 14<sup>th</sup> November 2022. It was their case that the respondents herein, had imported hot rolled steel wire rods quality sae 1006 in coils size diameter 5.5mm under import entry number 20191CD129757 and classified the consignment under 2017 EAC/CET Code 7213.91.90.
11. The said consignment was partially verified and classified under 2017 EAC/CET Code 7227.90.00 as suggested by its SIMBA online report and he further clarified that their verification report suggested the classification be done under 2017 EAC/CET Code 7217.10.00. Based on these inconsistencies, the respondent's consignment was released under seal for destination sampling to allow for tariff arbitration after the respondent herein gave their undertaking to pay extra taxes should the same be approved.
12. The Appellant averred that its inspection and test centre carried out sample tests on the imported iron rods and vide their letter dated 16<sup>th</sup> November 2021, notified the respondent of its laboratory results, which lead to the reclassification of the said iron rods under classification 2017 EAC/CET Code 7227.90.00. In response, the respondent did write to them appealing against the said reclassification and urged them to be guided by the mill test certificates issued by the product manufacturers to maintain the previous classification, but upon review they maintained the imported iron rods ought to have been classified under EAC/CET Code 7227.90.00 as per their laboratory analysis. They therefore sent out their enforcement letter dated 22<sup>nd</sup> March 2022 and demand letter dated 4<sup>th</sup> May, 2022 rightfully demanding for additional tax amounting to Kshs 1,155,914.00/=.
13. As per the laboratory analysis undertaken, at their inspection and testing centre, the chemical composition of the iron rods revealed that it contained iron (99.44%), manganese (0.322 %), boron (0.0066%) and trace amounts of chromium, copper and aluminium. Since the boron amount had exceeded the threshold of 0.0008% the imported iron rods qualified to be classified under 2017 EAC/CET Code 7227.90.00, which under note (f) of chapter 72 EAC/CET handbook, where the term "other alloy steel" had been assigned to, " steel not complying with the definition of stainless steel and containing by weight one or more of the following elements in the proportion shown:- 0.0008% or more of boron".
14. The appellant emphasized that their reclassification of the imported products was lawful and sanctioned by Section 235 and 236 of EACCMA and the onus was then thrown back to the respondent under section 30 of the *Tax Appeals Tribunal Act*, to provide any material evidence that would have led them to arrive at a different review decision. The respondent had failed to do so and they thus urged the tribunal to uphold their review decision and dismiss the Appeal filed.
15. The tribunal having considered all the evidence adduced did find that, while, the Mill test certificate can verify the imported product chemical and physical properties, the same having been issued by the manufacturer may not always be sufficient to ensure accuracy and reliability of the products composition for the simple reason that the said milling certificate is prepared by the contracted manufacturer, and they generally align its findings with its factory manufacturing standards or the clients specific requirements. In other words, the content of a Mill test certificate maybe flawed and contain inaccurate or misleading data that do not conform with the product ordered.
16. Be that as it may, the said tribunal further did find that the appellant too failed to provide them/ present the laboratory sampling form signed by the sample collector, a witness and an agent of the company where the sample was collected. The same form should have mandatorily contained a reference number of the sample collected, which would be referenced in the laboratory test the appellant claimed to have



undertaken as captured by the laboratory analysis report dated 31<sup>st</sup> January, 2022, the tariff ruling dated 16<sup>th</sup> November, 2021 and finally its review decision dated 7<sup>th</sup> February, 2022.

17. Based on the foregoing the tribunal did find in favour of the respondent herein and set aside the appellant's review decision dated 7<sup>th</sup> February, 2022. Each party was condemned to bear their own costs.

### **C. The Appeal**

18. Being dissatisfied with the said decision, the Appellant filed their Notice of Appeal pursuant to Section 32(1) of the *Tax Appeals Tribunal Act*, dated 13<sup>th</sup> August 2023 and further filed their memorandum of Appeal dated 12<sup>th</sup> September, 2022 where they raised the following grounds of Appeal, namely that;
  - a. That the Tax Appeals tribunal erred in fact by contradicting itself and considering the respondent's classification despite the authenticity of the Mill certificates not being proved by the Respondent as per paragraph 63.
  - b. That the tribunal erred in paragraph 66 of its judgment in failing to appreciate that the laboratory sample analysis report was specially contained in the tariff classification dated 7<sup>th</sup> February 2022 specifically referenced in paragraph 12 of the Appellants statement of facts.
  - c. That the tribunal erred in law in faulting the Appellants reclassification of the imported goods without legal basis.
19. The Appellant thus prayed that this Appeal be allowed, the judgment of the Tax Appeals tribunal dated 14<sup>th</sup> July 2023, be set aside, and that the Appellants' reclassification of the imported goods be confirmed. They also prayed to be awarded costs of this Appeal.

### **D. Parties Submissions**

#### **i. The Appellants Submissions**

20. The Appellant filed their submissions dated 15.04.2025, where they rehashed all the facts of the dispute at hand and emphasized that they had properly re-classified the imported consignment of hot rolled steel wire rods quality SAE 1006 in coils size diameter 5.5mm under classification HS Code 7227.90.00 of the EAC/CET based on its verification undertaken at their laboratory, which confirmed that the said steel wire rods contained iron (99.44%), manganese (0.322 %), boron (0.0066%) and trace amounts of chromium, copper and aluminium. Reliance was placed in the case of Republic Vrs Commissioner General & Another, Ex Parte Awal Ltd (2008) Eklr & Beta Healthcare International Ltd Vrs Commissioner of Customs Services (2010) eklr, where adherence to the international convention on the Harmonized commodity description and coding system was emphasized.
21. Secondly, the Appellant faulted the tribunal for finding that their laboratory analysis report dated 31<sup>st</sup> January, 2022 was unreliable to establish the composition and tariff classification of their product on the basis that it was not a pleaded issue in the respondent's memorandum of appeal dated 31<sup>st</sup> May, 2022 and statement of fact dated 6<sup>th</sup> June 2022. In particular, they emphasized that the respondent did not raise the issue of disparity in the sample collected by the Appellant agents and the sample analysed and therefore in purporting to make a determination on the said issue, amounted to trial by ambush as they did not have a chance/right of reply.
22. It was to be noted that the respondent only raised this allegation of mismatch of the laboratory sample and results in their submissions, which ought to have been ignored as submissions were not pleadings and parties could not diverge from ventilated issues. Reliance was placed on the case of Dakianga



Distributers (k) Ltd Vrs Kneya seed Company Limited (2015) eklr, where the point that parties being bound by their pleadings was emphasized.

23. The Appellant further pressed home the fact that despite the tribunal alleging that, they had not produced the laboratory analysis report as part of their documents, the same infact formed part of the documentation filed and was adduced as Exhibit KRA-3 annexed to the statement of facts filed before the tribunal (Page 63 of the record of Appeal). It was therefore an error for the tribunal to disregard the same and/or term the said report as unreliable without analysing the same. Based on the said laboratory report, it had been conclusively determined that the imported steel rod fell squarely under HS Code 7227 of the EAC/CET 2017 version which provided for, “Bars and rods, hot-rolled, in irregularly wound coils, of other alloy steel;  
7227.90.00- other kg 25% or \$200/MT whichever is higher”
24. The Appellant therefore urged this court to find that the respondent/taxpayer had not discharged the burden placed on them to disapprove that the tax levied on their imported product was irregular and thus prayed that this Appeal be allowed, the judgment of the tribunal be reversed, and their review decision dated 7<sup>th</sup> February, 2022 be upheld.

## **ii. The Respondents Submissions**

25. The Respondent, on their part, filed submissions dated 22.05.2025 and maintained that the tribunal’s finding was proper and correct given that the imported hot rolled steel wire in coils was rightly classified and declared under EAC/CET HS Code 7213.91.90 (Bars and rods, hot rolled, in irregularly wounded. coils of iron or non-alloy steel) and this was supported by the Milling certificate which indicated that the product did not contain Boron above the threshold of 0.0008%.
26. They further submitted that the reclassification of their goods by the Appellant was inconsistent with the technical specifications of their goods, the supporting documentation, the established definitions within the harmonized system and that had led to unjustified demand for additional taxes and penalties. They also urged the court to note that the imported rods were raw material specifically intended to be used for the manufacture of welding electrodes, which did not need boron as part of its component.
27. Secondly, they also urged this court to note that they had sufficiently proved that the tax decision was incorrect, by providing mill test certificates to support their case and this shifted the burden of proof to the appellant to disapprove the same. To do so, the appellant had relied on their tariff ruling dated 16<sup>th</sup> November, 2021 and laboratory test result dated 31<sup>st</sup> January, 2022 to arrive at their review decision dated 7<sup>th</sup> February, 2022 but crucially failed to present requisite laboratory sample form, which by established procedure and principles of natural justice ought to be signed by the sample collector, a witness and an agent of the importing company.
28. In the Absence of the said signed sampling form, the integrity of the sample collected and subsequent laboratory tests results remained doubtful as it lacked verifiable chain of custody and assurance that the sample tested was indeed extracted from the respondent’s consignment and give confidence that it had not been tampered with. Reference was made to the case of Commissioner of investigations and Enforcement V Pearl Industries Limited (Tax Appeal No E086 of 2020), {2022} KEHC 51 (KLR) which dealt with the issue of shifting burden of proof.
29. The Appellants failure to adhere to these basic procedural safeguards vitiates the evidential weight of their purported laboratory findings and rendered their reclassification decision arbitrary and unreliable. To that extent the tribunal finding could not be faulted and they urged this court to so hold.



30. The respondent thus urged this court to find that this Appeal lacks merit and prayed that it be dismissed with costs.

#### **D. Analysis and Determination**

31. In determining this Appeal, this court exercising Appellate jurisdiction that is circumscribed by Section 56(2) of the Tax Procedure Act, which provides that, “ An appeal to the High Court or to the court of Appeal shall be on a question of law only”. An appeal limited to matters of law does not permit the appellate court to substitute the tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts. In *John Munuve Mati Vr The returning officer, Mwingi North Constituency & 2 others (2018) eKLR*, what amounts to “matters of law” was described as;

(38) The interpretation or construction of *the constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context, and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into consideration of the credibility of witnesses or which witnesses are more believable than others; by law, that is the province of the trial court.

32. I have considered the entire record of appeal, the parties’ respective submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court’s record. The two issues that arise for determination are whether;
- a. Whether the tribunal erred in determining the Appeal on an issue which was not pleaded
  - b. Whether the burden of proof shifted, once the Respondent had provided their Milling certificate to prove the content/ composition of the product imported

#### **Issue I: Whether the tribunal erred in determining the Appeal on an issue which was not pleaded**

33. It is trite law that parties are bound by their pleadings and the court too cannot diverge into issues not ventilated by the parties in their pleadings. See *Dakianga Distributor’s (K) Ltd Vrs Kenya seed company Limited (2015) eKLR*, where they cited with approval findings of Supreme court of Malawi in *Malawi Railways Limited Vrs Nyasulu (1998) MWSC 3*.
34. The Appellant averred that in the memorandum of Appeal dated 31<sup>st</sup> May 2022 and statement of facts dated 6<sup>th</sup> June, 2022, the respondents did not raise the issue of disparity in the sample collected and analysed by the Appellants agents and that the tribunal had therefore erred in making a finding on this issue not raised by the parties, thereby denying the Appellant the right of reply.
35. The appellants’ averments on this score is incorrect as this issue was specifically raise on ground (iii) of the memorandum of Appeal dated 7<sup>th</sup> June, 2022 and also raised during hearing, where the respondents witness averred to the fact that the sample tested was deliberately interfered with the sole aim to enhance taxes. In response it was the Appellant case that the consignment was released under seal for destination sampling to allow for tariff arbitration after they had received a letter of undertaking from the respondent to pay extra tax was approved.
36. The Appellant further averred in response to this issue that its inspection and testing centre carried out destination sampling and further testing and analysis and vide their letter dated 16<sup>th</sup> November,



2021 notified the respondent of the laboratory results. The Appellant appealed against the latter tariff clarification through their letter dated 19<sup>th</sup> January, 2022, urging the appellant to be guided by the Mill test certificate to find that the imported products were wire rods imported under HS 7213.91.90, but this was rejected vide their review decision dated 7<sup>th</sup> February, 2022, where they upheld the classification under HS Code 7227.90.00 as per the laboratory analysis.

37. It is obvious and clear that this ground of Appeal holds no water, as this issue was specifically pleaded, evidence of the same led and responded to. The tribunal therefore cannot be faulted on making a determination on the same.

### **iii. Burden of Proof**

38. While the burden of proof in tax disputes initially rests on the taxpayer, it is not absolute. Under certain circumstances, the burden may shift to KRA, particularly in cases where they allege fraud or improper tax assessments. This explains why the Court in Commissioner of Domestic Taxes V Trical and Hard Limited, (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR) & Halinto General Distributors Ltd v Commissioner, Investigations and Enforcement (Income Tax Appeal E043 of 2021) [2023] KEHC 22883 (KLR) described the burden of proof in tax matters as a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer.
39. The Appellant levied extra tax based on laboratory results carried out on the hot rolled steel wire rods imported by the respondent. The respondent having challenged the validity of this process, it was incumbent upon the appellant to prove that, the sampling process was correctly handled and eventually reference with the ensuing the laboratory report. The Appellant failed to do so and the tribunal correctly held that under the circumstances they are not persuaded that sample analysed on 31<sup>st</sup> January, 2022, to determine the review decision dated 7<sup>th</sup> February 2022, is the same sample that was collected from the Appellant in 2019 and claimed to have been tested to arrive at the tariff ruling dated 16<sup>th</sup> November, 2021.
40. Simply put, how did the Appellant arrive at their ruling dated 16<sup>th</sup> November, 2021, when the laboratory results were issued on 31<sup>st</sup> January, 2022. Further they also failed to provide evidence to sanitise the sample collection process, which evidentially was not procedurally carried out and finally they delayed to issue results from Mid-2019 to January 2022 casting aspersions as to the veracity of the said laboratory tests results.

### **E Disposition**

41. This Upshot is that this Appeal lacks merit and the same is dismissed with costs to the Respondent.
42. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 11<sup>TH</sup> DAY OF SEPTEMBER 2025**

No appearance for Appellant

No appearance for Respondent

L. Munguti - Court Assistant

